

# Appeal Procedures Employee Plans Examinations

Department  
of the  
Treasury  
**Internal  
Revenue  
Service**

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These instructions apply to actions proposed in a revocation letter, nonqualification letter, or examination/discrepancy adjustment report for:

(1) Employee plans information returns in the Form 5500 series relating to:

(a) Revocations in those examination cases in which a favorable determination letter was previously issued by the Internal Revenue Service (IRS), and

(b) Nonqualifications in those examination cases in which the employer has not received a favorable determination letter from the IRS;

(2) Discrepancy adjustments resulting from the revocations or nonqualifications described in 1(a) and 1(b) above.

(3) Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, for minimum funding deficiencies, prohibited transactions, and various other employee benefit plans excise taxes under Chapter 43 of the Internal Revenue Code; and

(4) Form 990-T, Exempt Organization Business Income Tax Return, reporting the unrelated business income tax liability of the employee plan's trust.

The following tells what you should do if you agree and explains your appeal rights if you do not agree.

## If You Agree

If you agree to the action proposed with regard to the employee plans information return (Form 5500 Series), you must file Form(s) 1041, U.S. Fiduciary Income Tax Return, for the years to which the revocation/nonqualification applies. You must also sign the enclosed agreement Form(s) 4549-E, Income Tax Discrepancy Adjustments. The executed forms should be returned to the person who examined your employee plan.

If the proposed revocation/nonqualification is accompanied by Form(s) 4549, Income Tax Examination Changes, follow the instructions in Publication 5 on how to agree with those changes.

If an employee plans tax return, Form 5330, or Form 990-T, is involved, please sign the enclosed agreement form. By signing this form, you will agree to the amount shown on the examination report. If you owe additional

tax, any interest charge will stop 30 days after you file the form. No further interest or penalties will be charged unless you do not pay the amount you owe within 10 days after the date of the notice you will receive requesting payment.

If you pay the tax when you sign and file the agreement form, interest stops immediately. Please make your check or money order payable to the IRS. Include interest computed as explained in the enclosed Notice 746 on the additional tax (but not on penalties) from the return's due date to the payment date. Be sure to include your social security number or employer identification number on your check or money order. Please do not send cash through the mail.

If the examination results in an overpayment, you will receive interest (see Notice 746) on the amount of the overpayment.

## If You Don't Agree

If you do not agree with the examiner's findings, you have the option of requesting a meeting with the examiner's supervisor to discuss the findings. If you still do not agree, we urge you to appeal your case to an IRS Appeals Office. Most differences can be settled in Appeals without expensive and time consuming court trials. Appeals conferences are not available to taxpayers whose reasons for disagreement do not come within the scope of the internal revenue laws. For example, a disagreement based solely on moral, religious, political, constitutional, conscientious, or similar grounds.

If your case involves an income or excise tax adjustment and you do not want to appeal your case within the Service, you can take it directly to court. However, if your case involves an IRS determination that the plan is not qualified, you may appeal your case within the Service before petitioning for United States Tax Court review of the case under declaratory judgment procedures. See Qualification/Deduction Issues below.

The following general rules tell you how to appeal your case.

## Appeal Within the IRS

You may appeal an IRS decision to a regional Appeals Office, which is independent of your local District Director or Service Center Director. The regional Appeals Office is the designated office for filing an appeal within the IRS. Appeals conferences are conducted in an informal manner.

If you want an appeals conference, write to your District Director or Service Center Director according to the instructions in our letter to you. Your director will refer your request to the Appeals Office to arrange a conference at a convenient time and place. You or your representative should be prepared to discuss all disputed issues at the conference. Most differences are settled at this level.

## Written Protests

When you request an appellate conference in an employee plans case, you must file a formal written protest or a brief statement of disputed issues with your District Director or Service Center Director.

The protest should be sent within the time limit specified in the letter you received with the examination report and should contain the following:

- 1) Your name and address,
- 2) A statement that you want to appeal the examination findings to the Appeals Office,
- 3) The date and symbols from the letter showing the proposed changes and findings you disagree with,
- 4) The tax periods or years involved,
- 5) An itemized schedule of the changes with which you disagree,
- 6) A statement of facts supporting your position on any issue with which you disagree, and
- 7) A statement stating the law or other authority on which you rely.

You must declare that the statement of facts under (6) is true under penalties of perjury. Do this by adding the following signed declaration:

"Under the penalties of perjury, I declare that I have examined the statement of facts presented in this protest and in any accompanying schedules and, to the best of my knowledge and belief, it is true, correct, and complete."

If your representative submits the protest for you, he or she may substitute a declaration stating:

- 1) That he or she prepared the protest and accompanying documents and
- 2) Whether he or she knows personally that the statement of facts in the protest and accompanying documents are true and correct.

## Qualification/Deduction Issues

When the EP/EO Division examines a Form 5500 and determines the plan is not qualified, that Division will

issue a proposed revocation letter, or proposed nonqualification letter if appropriate. A taxpayer who wants to appeal the qualification issue and the related income tax adjustments should do so under the procedures explained in these instructions. A taxpayer must first exhaust this administrative remedy within the IRS before petitioning the United States Tax Court for a declaratory judgment. Where the declaratory judgment is based on an examination, as opposed to an application submitted by a taxpayer, the taxpayer will be "deemed" to have exhausted its administrative remedies once the Service has issued its final letter even if the taxpayer did not pursue this available administrative appeals procedure. If the taxpayer does not appeal, the IRS will assess the related income taxes on the trust, the employer, and plan participants and beneficiaries.

## Representation

You may represent yourself at your appeals conference, or you may be represented by an attorney, certified public accountant, enrolled actuary or enrolled agent. Your representative must be qualified to practice before the IRS. Your representative must file a power of attorney before receiving or inspecting confidential information. Form 2848, Power of Attorney and Declaration of Representative, or any other properly written power of attorney or authorization may be used for this purpose. You can get copies of Form 2848 from an IRS office or by calling 1-800-829-3676.

You may also bring witnesses to support your position.

## Tax Court Declaratory Judgment Cases

If after the examination of your plan, you receive a final revocation letter, or a final nonqualification letter, you may petition the United States Tax Court for a declaratory judgment under Code section 7476 on the qualified status of the plan. The Tax Court is independent of the IRS. The petition must be filed on or before the 91st day after the date of mailing of the final revocation or final nonqualification letters. Those who may petition the Tax Court for declaratory judgment are an employer, a plan administrator, an employee who qualifies as an interested party, or the Pension Benefit Guaranty Corporation.

## Tax Court Deficiency Cases

If your case involves a disagreement over whether you owe additional income taxes as a result of a discrepancy adjustment because your plan is not qualified, unrelated business income tax from the employee plan

trust, additional income taxes or Chapter 43 excise taxes, you may go to the United States Tax Court after the Service has issued a formal letter, called a Statutory Notice of Deficiency. You have 90 days from the date this notice is mailed to you to file a petition with the Tax Court (or 150 days if addressed to you outside the United States). If you do not file the petition within the 90-day period (or 150 days as the case may be), the law requires that we assess and bill you for the deficiency.

**If you discuss your case with the Internal Revenue Service during the 90-day period (150-day period), the discussion will not extend the period in which you may file a petition with the Tax Court.**

The Court will schedule your case for trial at a location convenient to you. You may represent yourself before the Tax Court, or you may be represented by anyone permitted to practice before that Court.

If you dispute not more than \$10,000 for any one tax year, there are simplified procedures. In the case of Chapter 43 tax the \$10,000 maximum applies to the total tax and penalties for each taxable period. You can get information about these procedures and other matters relating to the Court by writing the Clerk of the Tax Court, 400 Second St. N.W., Washington, DC 20217.

## **District Court and Claims Court Refund Suits**

Instead of going to Tax Court, you may take your income tax or excise tax case to the United States District Court or to the United States Claims Court. The District Court and the Claims Court hear tax cases only after you have fully paid the tax and have filed a timely claim for refund. You can get information about procedures for filing suit in either court by contacting the Clerk of your District Court, or the Clerk of the Claims Court. Claims for refund must be filed with the Service within 2 years of payment of the tax or 3 years of the filing of return submitting the payment whichever occurs later. If the IRS does not act on your claim within 6 months from the date you filed it, you can then file suit for refund. If the IRS disallows your claim, a suit for refund must be filed in the U.S. District Court or Claims Court, no later than 2 years from the date of the disallowance. (However, if you are a nonresident alien taxpayer, you cannot take your case to a United States District Court.)

## **Recovering Administrative and Litigation Costs For Tax Court Deficiency Cases and Refund Suits**

You may be able to recover your litigation and administrative costs in Tax Court deficiency cases and refund suits if you are the prevailing party and if:

(1) You exhaust all administrative remedies with the IRS, (ie, taking your case to the IRS Appeals Office).

(2) Your net worth is below a certain limit (see **Net worth requirement**, later), and

(3) You provide all requested documentation and you do not otherwise unreasonably delay the administrative and court proceedings.

### **Prevailing Party**

You are the prevailing party if you meet all the following requirements:

You can show that the IRS's position in the court and administrative proceedings was not substantially justified.

You substantially prevailed with respect to the amount in controversy, or on the most significant tax issue or set of issues in question.

You meet the net worth requirement, discussed later.

Although the court will generally decide who is the prevailing party, a final determination of liability at the administrative level is decided by the IRS. Thus, administrative costs may be received from the IRS without a taxpayer going to court.

### **Reasonable litigation costs**

Reasonable litigation costs generally include:

Reasonable amounts for court costs,

Expenses of expert witnesses,

The costs of studies, analyses, engineering reports, tests, or projects which the court agree were necessary for the preparation of your case, and

Attorney fees that generally may not exceed \$75 per hour.

### **Reasonable administrative costs**

Reasonable administrative costs generally include:

All of the costs listed under litigation costs, except court costs, and any administrative fees or similar charges made by the IRS. Administrative costs include costs incurred on or after the earlier of the date the taxpayer receives the appeals decision letter or the date of the notice of deficiency. For purposes of administrative attorney fees include the fees of individuals licensed to practice before the service or the tax court.

### **Net worth requirement**

An individual taxpayer may be able to recover litigation and administrative costs if this or her net worth was not more than \$2,000,000 when the litigation began and/or when administrative costs become recoverable. To qualify, the net worth of the owner of an unincorporated business, or a partnership, corporation, association, unit of local government, or organization cannot be more than \$7,000,000 and cannot have more than 500 employees when the litigation began. Net worth for administrative costs recoveries should be measured from the beginning of the administrative proceeding not from the point when such costs become recoverable.

## Penalty

Whenever the Tax Court determines that proceedings before it have been instituted or maintained by a taxpayer

primarily for delay or that the taxpayer's position in such proceedings is frivolous or groundless, damages in an amount not in excess of \$25,000 shall be awarded to the United States by the Tax Court in its decision.

### Appeal Procedure for Employee Plans Examinations

#### At any stage of procedure:

- You may arrange for agreement and payment of tax or for corrective action.
- You may ask for issuance of a notice of deficiency to allow petition to the Tax Court.
- You may pay the tax and file a refund claim.

